GOLDBERG, STINNETT, MEYERS & DAVIS
A Professional Corporation
KATHERINE D. RAY, ESQ. (CA BAR NO. 121002)
44 Montgomery Street, Suite 2900
San Francisco, CA 94104
Telephone: (415) 362-5045
Facsimile: (415) 362-2392

BAKER BOTTS L.L.P.
STEVEN L. LEIFER, ESQ. (admitted *pro hac vice*)
JOSHUA B. FRANK, ESQ.
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
Telephone: (202) 639-7723
Facsimile: (202) 585-1040

Attorneys for Plaintiff,
HEXCEL CORPORATION, Reorganized Debtor

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

| | |
|---|---|
| In re:<br><br>HEXCEL CORPORATION, a Delaware corporation,<br><br>Reorganized Debtor. | Case No. 93-48535 T<br><br>Chapter 11 |
| HEXCEL CORPORATION, a Delaware corporation,<br><br>Plaintiff,<br><br>vs.<br><br>NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,<br><br>Defendants. | A.P. No. 04-4246<br><br>Date: February 17, 2005<br>Time: 2:00 p.m.<br>Place: 1300 Clay Street<br>Courtroom No. 201<br>Oakland, CA<br>Judge: Hon. Leslie Tchaikovsky |

**PLAINTIFF HEXCEL CORPORATION'S OPPOSITION TO THE MOTION FOR JUDGMENT ON THE PLEADINGS OF THE ENVIRONMENTAL PROTECTION AGENCY**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES



### FEDERAL STATUTES

## I. INTRODUCTION

On or about February 10, 2004, the U.S. Environmental Protection Agency ("EPA") sent a General Notice of Potential Liability ("Notice Letter") under the Comprehensive Environmental Response, Compensation, and Control Act ("CERCLA") to approximately 41 companies, including Hexcel Corporation ("Hexcel"), seeking contribution to EPA's cost for conducting a remedial investigation and feasibility study ("RI/FS") of natural resource damages in the Lower Passaic River. The Notice Letter states that Hexcel "may be potentially liable for response costs which the government may incur relating to the study of the Lower Passaic River." In addition, the Notice Letter states that "responsible parties may be required to pay damages for injury to, destruction of, or loss of natural resources, including the cost of assessing such damages."

Hexcel initiated this adversary proceeding by filing a complaint on July 30, 2004. Hexcel's complaint contends that EPA's claims stated in the Notice Letter arose from Hexcel's operation of Hexcel's Lodi, New Jersey facility prior to the date Hexcel's petition for bankruptcy was filed. Complaint at ¶ 33. As such, Hexcel contends that the claims set forth in the Notice Letter represent "claims" under Section 101(5) of the Bankruptcy Code, 11 U.S.C. § 101(5), that were discharged in Hexcel's prior bankruptcy. Complaint at ¶ 34. Hexcel is not challenging in this adversary proceeding the substance of EPA's claims against Hexcel relating to the Notice Letter or the RI/FS. Rather, Hexcel seeks a determination of whether Hexcel's liability to EPA for the claims set forth in the Notice Letter, if any, was discharged in Hexcel's bankruptcy.

EPA's motion for judgment on the pleadings rests solely on the bar on pre-enforcement review set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9316(h). That section states:

> No Federal Court shall have jurisdiction under Federal Law ... or under State law which is applicable or relevant and appropriate ... to review any challenges to removal or remedial action selected under Section 9604 of this title, or to review any order issued under Section 9606(a) of this title, in any action except one of the following:
>
> (1) An action under Section 9607 of this title to recover response costs or damages or for contribution.
>
> (2) An action to enforce an order issued under Section 9606(a) of this title or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under Section 9606(b)(2) of this title.
>
> (4) An action under Section 9659 of this title (related to citizen suits) alleging that the removal or remedial action taken under Section 9604 of this title or secured under Section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
>
> (5) An action under Section 9606 of this title in which the United States has moved to compel a remedial action.

*Id.* For purposes of this opposition brief, Hexcel does not dispute that the five exceptions to Section 113(h) have not yet been triggered. However, this does not mean that this Court is deprived of jurisdiction to hear Hexcel's adversary proceeding. Rather, the exceptions to Section 113(h) are relevant only if Section 113(h) is triggered in the first instance. Because Hexcel does not here challenge its liability to EPA under CERCLA and does not challenge any removal or remedial action taken by EPA or any order issued by EPA under Section 106(a), Section 113(h) is simply not applicable. *See, e.g., Manville Corporation v. United States*, 139 B.R. 97 (S.D.N.Y. 1992) (holding under circumstances almost identical to the instant case that Section 113(h) was not triggered by a post-confirmation adversary proceeding).

Furthermore, this Court is the proper forum for litigation over whether the claims made by EPA were discharged in Hexcel's prior bankruptcy. Article XI of the confirmed Plan[1] ("Retention of Jurisdiction") contemplates the potential for post-confirmation litigation of whether a claim has been discharged under the Plan, and provides for *exclusive* jurisdiction of the Bankruptcy Court to determine matters pertaining to Section 1142 of the Bankruptcy Code. *See In re Johns-Manville Corp.*, 7 F.3d 32, 34 (2d Cir. 1993) (bankruptcy court's post-confirmation authority is limited to matters concerning the implementation of a confirmed plan); *accord In re Goodman*, 809 F.2d 228 (4th Cir. 1987).

## II. SUMMARY OF ARGUMENT

EPA moves for judgment on the pleadings on only one issue: whether this Court lacks subject matter jurisdiction pursuant to Section 113(h) of CERCLA. Essentially, EPA argues that Hexcel may not challenge EPA's decision to undertake an RI/FS on the Lower Passaic River and that Hexcel may not challenge its liability to contribute to the investigation prior to an EPA enforcement action against Hexcel, because such pre-enforcement review would violate the bar set forth in Section 113(h) of CERCLA. Similarly, EPA argues that the Notice Letter has not lifted the bar of Section 113(h) such that this Court still lacks jurisdiction to hear the case.

EPA's entire argument rests on the incorrect assumption that Section 113(h) is triggered in the first instance. By its plain language, Section 113(h) operates to divest the Court

---

[1] Article XI of the Plan states in pertinent part:

"The Bankruptcy Court shall have exclusive jurisdiction of all matters arising out of, and related to, the Chapter 11 Case and the Plan pursuant to, and for the purposes of, Sections 105(a) and 1142 of the Bankruptcy Code and for, among other things, the following purposes: ...

(b) To determine any and all pending adversary proceedings....
(h) To hear and determine disputes arising in connection with the interpretation, implementation, or enforcement of the Plan. ..."

of jurisdiction only under limited circumstances, none of which are present here. Section 113(h) removes jurisdiction for any challenge to a removal or remedial action selected by EPA under CERCLA Section 104 or for the review any order issued under CERCLA Section 106(a). Neither of these circumstances is at issue in this adversary proceeding.

Hexcel does not challenge here any substantive decision made by EPA with respect to the Lower Passaic River. Hexcel does not take issue with EPA's decision to undertake an RI/FS, nor does Hexcel take issue with any proposed or actual element of EPA's investigation. Further, Hexcel does not here challenge its liability to EPA under CERCLA for its alleged past releases.[2] Any such representations by EPA are plain misrepresentations of Hexcel's complaint and the purpose of this adversary proceeding. Hexcel asks this Court only to determine whether EPA's claims as set forth in the Notice Letter were discharged in Hexcel's prior bankruptcy proceeding. Section 113(h) does not apply. *See Manville*, 139 B.R. at 105. Furthermore, the rejection of EPA's motion would further the fresh start objectives of the Bankruptcy Code by allowing this Court to determine now whether EPA's claims were discharged in bankruptcy, as opposed to waiting a decade or more, to the detriment of Hexcel's post-confirmation creditors and investors who relied on Hexcel's discharge as being effective against claims based on Hexcel's pre-petition conduct. Furthermore, rejection of EPA's motion would not thwart the dual purposes of Section 113(h) to (1) ensure that challenges to EPA cleanup efforts do not delay cleanups and (2) avoid piecemeal litigation that could lead to disparate judgments. Here, this adversary proceeding will not delay EPA's efforts to complete an RI/FS, particularly because EPA already has reached a settlement with other parties to fund

---

[2] Hexcel certainly retains the right to challenge liability in any future EPA enforcement action against Hexcel. Here, however, Hexcel seeks only a declaration that EPA's claims were discharged in bankruptcy, an issue that does not implicate Section 113(h) of CERCLA.

the study. Furthermore, this proceeding does not present the risk of piecemeal litigation given that the issues raised herein are not susceptible to repetition or inconsistent judgments as they relate only to a determination of whether EPA's claims against Hexcel were discharged in bankruptcy. Therefore, the Court should reject EPA's motion for judgment on the pleadings and find that the Court has jurisdiction to hear this case.

## III. ARGUMENT

### A. Standard Of Review

Judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is appropriate only "when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Enron Oil Trading & Transportation Co. v. Walbrook Ins. Co. Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997) (citations and internal quotations omitted). Judgment "may be granted only when the pleadings show beyond doubt that the plaintiff can prove no set of facts in support of [its] claims that would entitle [it] to relief." *Id.* (citations and internal quotations omitted).

### B. Section 113(h) of CERCLA Does Not Bar This Adversary Proceeding

EPA's entire brief is based on its argument that Section 113(h) of CERCLA bars this Court from determining whether EPA's claims against Hexcel were discharged in Hexcel's prior bankruptcy proceeding. EPA misconstrues section 113(h) of CERCLA, mischaracterizes Hexcel's challenge as one to EPA's substantive activities as opposed to a request for a determination that EPA's claims were discharged in bankruptcy, and fails to alert the Court to contrary precedent for the cases EPA claims are controlling. EPA's attempts to conflate Hexcel's bankruptcy complaint with any direct challenge to EPA's activities on the Passaic River must not be countenanced.

Below, Hexcel responds directly to EPA's two main arguments. In Section II of its Brief, EPA argues that this Court is prohibited from hearing this challenge under Section 113(h) because EPA has not yet brought an enforcement action against Hexcel under Sections 106 or 107 of CERCLA. This argument focuses on the exceptions to Section 113(h)'s bar on pre-enforcement review (claiming that Hexcel has not met the exceptions), but ignores the plain prefatory language of Section 113(h) which applies only to challenges to removal or remedial actions selected by EPA under CERCLA Section 104 or requests that the Court review any order issued under CERCLA Section 106(a). This adversary proceeding does not challenge any removal or remedial action under Section 104 and does not relate to any order issued under Section 106(a). Rather, Hexcel seeks a determination of whether EPA's claims were discharged in Hexcel's bankruptcy. Such a determination is not covered by the language of Section 113(h) and this Court is not barred from hearing this case.

Similarly, in section III of its Brief, EPA characterizes Hexcel's challenge as a challenge to the RI/FS and claims that such a challenge is barred by Section 113(h). EPA has mischaracterized Hexcel's complaint, which is aimed at determining whether EPA's claims were discharged in Hexcel's bankruptcy, and is not a challenge to EPA's decision to undertake an RI/FS or to any substantive action EPA has taken, or will take, relative to the RI/FS. The only question before this Court is whether EPA's claims against Hexcel were discharged in bankruptcy. Section 113(h) is not implicated by Hexcel's complaint and this Court has jurisdiction to make a determination in this adversary proceeding.

### 1. Hexcel Does Not Seek Pre-Enforcement Review Of Its Liability, And Thus, Section 113(h) Of CERCLA Does Not Apply.

Relying on *Voluntary Purchasing Groups v. Reilly*, 887 F.2d 1380 (5th Cir. 1989), EPA argues that CERCLA Section 113(h) bars a suit seeking a pre-enforcement

determination of liability to EPA under CERCLA. EPA Brief at 13-14. EPA states that potentially responsible parties cannot seek judicial resolution of CERCLA liability until EPA initiates an enforcement action. *Id.* Hexcel does not debate these basic tenets of Section 113(h). However, EPA fails to demonstrate any linkage between the adversary proceeding initiated by Hexcel and such a "suit seeking a pre-enforcement determination of liability...." That missing nexus is crucial because the plain language of Section 113(h) applies only to suits seeking pre-enforcement review of EPA's removal or remedial action. *See General Electric Co. v. EPA*, 360 F.3d 188, 191 (D.C. Cir. 2004) ("Congress thus enumerated only two types of challenges over which federal courts lack jurisdiction – challenges to § 104 actions and § 106 orders.")

Here, Hexcel does not seek any pre-enforcement determination of liability as discussed in *Voluntary Purchasing* or any review of EPA's removal or remedial action as set forth in the statute. The question here is not whether Hexcel is liable under CERCLA, but whether any such liability was discharged in bankruptcy. CERCLA Section 113(h) is therefore not implicated.

CERCLA Section 113(h) provides that:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following [five exceptions]: ....

As is evident, this section applies only in limited circumstances, and not to adversary proceedings in bankruptcy seeking discharge of claims. "The presumption in favor of judicial review may be overcome 'only upon a showing of "clear and convincing evidence" of a contrary

legislative intent.'" *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (citations omitted). EPA plainly has failed to demonstrate how the language of Section 113(h) applies here.

Next, EPA cites *Barmet v. Reilly*, 927 F.2d 289 (6th Cir. 1991), for the proposition that the issuance of a notice letter does not remove the bar on pre-enforcement review. This assumes that the review in question was barred in the first instance. In *Barmet*, the 6th Circuit concluded that a constitutional challenge to CERCLA's statutory scheme was barred by Section 113(h) and that the issuance of a notice letter did not meet one of the exceptions set out in that section.[3] The question here is whether the adjudication of bankruptcy dischargeability is barred by the plain language of Section 113(h) in the first instance. As discussed above, Section 113(h) only bars challenges to any removal or remedial action under Section 104 or to any order issued under Section 106(a). Here, Hexcel's claims regarding dischargeability do not implicate the plain language of Section 113(h) and thus this Court has jurisdiction to consider the issues raised here.

EPA relies on one case finding that Section 113(h) deprives the court of subject matter jurisdiction in a bankruptcy adversary proceeding. EPA Brief at 15 (citing *Powerlab, Inc. v. United States Environmental Protection Agency*, 184 B.R. 511 (N.D. Tex. 1995)). Yet the *Powerlab* court itself did not undertake any review of the language of Section 113(h). Instead, the court concluded, without providing any reasoning, that Section 113(h) deprived the court of jurisdiction because the adversary proceeding at issue "would necessarily be one to determine whether Powerlab may be liable for any part of the ... cleanup costs." *Id.* at 513. Thus, the Court did not grapple with the plain language of Section 113(h) which applies only to remove jurisdiction for challenges to removal or remedial action selected under Section 104 of CERCLA

[3] The reasoning of *Barmet* regarding the issue of pre-enforcement review of constitutional claims was called into question by *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991).

or for the review any order issued under Section 106(a) of CERLCA. Nor did the *Powerlab* court consider the interaction between CERCLA and the Bankruptcy Code.

Importantly, in its reliance on *Powerlab*, EPA failed to note contrary authority that is better reasoned; that better comports with the plain language of Section 113(h); and, that harmonizes Section 113(h) with the fresh start objectives of the Bankruptcy Code. In *Manville*, the court found that a post-confirmation dischargeability determination was not covered by Section 113(h) of CERCLA and that accelerated litigation was necessary to facilitate the fresh start objectives of the Bankruptcy Code. *Manville*, 139 B.R. at 102-3. Because *Manville* is properly reasoned, this Court should follow the same approach.

The *Manville* court first reviewed the plain language of Section 113(h). The court found that, "[b]y its terms, the statute limits review of 'any challenges to removal or remedial action selected under section 9604 of this title.'" *Manville,* 139 B.R. at 104 (citing 42 U.S.C. 9613(h); *Reardon v. United States*, 947 F.2d 1509, 1515 (1st Cir. 1991)). According to the court, had Manville contested "whether it had contributed to the wastes at the sites," or had Manville "challeng[ed] the methods the EPA used to remedy the site," Section 113(h) would have barred the action. *Manville*, 139 B.R. at 104 (citing *Reardon*, 947 F.2d at 1512-14; *Voluntary Purchasing*, 889 F.2d at 1390-91). Concluding that "[t]he statute therefore must yield to allow review in situations not within its reach," *Manville*, 139 B.R. at 104 (citations omitted), the court found that Manville's post-confirmation adversary proceeding "does not fall within the terms of § 113(h)." *Id.* at 105.

The *Manville* court next discussed the interaction of CERCLA and the Bankruptcy Code. Relying on *In Re Chateaugay Corp.*, 944 F.2d 997, 999 (2d Cir 1991), the *Manville* court noted that the Bankruptcy Code seeks to provide a debtor with a "fresh start"

while CERCLA seeks to delay litigation by focusing on remedial activities. *Manville*, 139 B.R. at 102-3. Noting the conflict, the court explained that the fresh start objective is implicated even by a post-confirmation adversary proceeding. *Id.* at 105. In finding that Section 113(h) did not apply to bar Manville's adversary proceeding, the court stated: "[A]bsent clear and convincing evidence that Congress wished to preclude review of the dischargeability of environmental claims, this Court should not reach to create an exception to Bankruptcy's across-the-board legislative scheme to advance the objectives of another statute." *Id.* (citing *Chateaugay*, 944 F.2d at 1002). The court therefore found that Section 113(h) did not operate to bar the court from a determination of dischargeability.

In any event, the legislative purpose advanced by Section 113(h) is not implicated here.[4] The purpose of the bar on pre-enforcement review is to (1) avoid delay in the government's site assessment and cleanup efforts and (2) prohibit piecemeal litigation where potentially responsible parties seek to second guess the government's assessment and environmental cleanup plans. *See Reardon*, 947 F.2d at 1513. One oft-cited quote discussing the second legislative purpose of Section 113(h) is that in *Voluntary Purchasing* where the Fifth Circuit stated:

> Although review in the case at hand would not delay actual cleanup of hazardous wastes, it would force the EPA--against the wishes of Congress--to engage in "piecemeal" litigation and use its resources to protect its rights to recover from any [potentially responsible party] filing such a[n] action.
>
> . . . . .
>
> Moreover, the crazy-quilt litigation that could result from allowing [potentially responsible parties] to file declaratory judgment

[4] Given the plain language of Section 113(h) does not cover this adversary proceeding, there is no need to review these policies and the legislative history. *See General Electric*, 360 F.3d at 191 ("We begin and end with the language of § 113(h), because when the statutory text is straightforward, there is no need to resort to legislative history.")

> actions prior to the initiation of government cost recovery actions could force the EPA to confront inconsistent results.

*Voluntary Purchasing*, 889 F.2d at 1390. However, this discussion of the legislative purpose must be understood in context. The chemical manufacturer in *Voluntary Purchasing* sought a declaratory judgment *that it was not liable* for EPA's response actions in connection with a site cleaned up by EPA. *Id.* at 1383. Under such circumstances, the court was concerned that if all the potentially responsible parties "were allowed to file suits for declaratory judgment [challenging liability] prior to cost recovery suits being filed by the EPA, much of the EPA's time and resources could end up being allocated to litigation in this area." *Id.* at 1390 (citations omitted). Here, Hexcel does not seek declaratory judgment regarding its liability under the Spill Act, but rather whether such liability, if it exists at all, was discharged. Thus the concerns set forth in the quote above, related to the purposes of Section 113(h), are not implicated.

Further emphasizing the focus on pre-enforcement challenges *to liability* in understanding the legislative purposes of Section 113(h), the *Voluntary Purchasing* court cited several cases decided before CERCLA was amended in 1986 to codify the bar on pre-enforcement review. *See id.* at 1387. All of the cases cited concern challenges to an EPA remedial plan or challenges to a liability. Similarly, cases directly interpreting Section 113(h) following its enactment confirm that the dual purposes of Section 113(h) must be understood as an effort to bar lawsuits prematurely challenging either liability or decisions made by EPA regarding ongoing remedial activities. *See, e.g., McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995), *cert. den.*, 516 U.S. 807 (1995) ("Section 113(h) protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort.... Congress concluded that the need for such action was paramount, and that peripheral disputes, including those over 'what measures actually are

necessary to clean-up the site and remove the hazard,' may not be brought while the cleanup is in process.") (emphasis in original) (citing *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3rd Cir. 1991)); *Fairchild Semiconductor Corp. v. EPA*. 769 F. Supp. 1553, 1559 (N.D.Cal. 1991) ("Fairchild challenges the very *object* of the remedy .... There is no basis for Fairchild's claim that it is *not* contesting EPA's remedial decision.") (emphasis in original); *Id.* (gathering cases concluding that "complaints which seek court-ordered modifications of the remedial decisions embodied in the Record of Decision are barred until remedial action is completed, unless one of the enumerated exceptions apply."); *Reardon*, 947 F.2d at 1514 (due process challenge "does not concern the merits of any particular removal or remedial action."); and *General Electric*, 360 F.3d at 194 ("the usual practical considerations counseling against pre-enforcement review are not present in the adjudication of a facial due process claim; it is a purely legal issue whose resolution does not depend on the type of information available only after site clean-up is completed, and does not have the potential of producing inconsistent programmatic results.") (citation omitted).

In contrast, Hexcel is not attempting to challenge its liability or EPA's activities prematurely, and thus Hexcel's complaint does not conflict with the dual purposes of Section 113(h). This adversary proceeding will not delay EPA's investigation or cleanup. EPA has entered a settlement with more than 31 companies to pay $10,000,000 towards the RI/FS and the process is moving forward. Further, similar to a facial due process challenge, this adversary proceeding does not represent piecemeal litigation that would have the potential to produce inconsistent programmatic results. Rather, this proceeding concerns bankruptcy issues particular to Hexcel that are not capable of repetition by other companies. The proceeding does not risk creating any substantive precedent related to EPA's remedial decisions and will not cause a flood

of other potentially responsible parties second-guessing EPA's assessment and remedial plans in court. Accordingly, the policies advanced by Section 113(h) will not be hindered by this adversary proceeding.

At the same time, the Bankruptcy Code's objective of providing the debtor with a fresh start would be undermined if the Court agrees that a determination regarding whether EPA's claim was discharged in bankruptcy is tantamount to pre-enforcement review of liability. If the Court were to await the completion of the RI/FS and cleanup before allowing Hexcel to seek a determination that its claims were discharged in bankruptcy, a decade or more could pass, during which time Hexcel's fresh start also would be postponed, to the detriment of those parties who reasonably relied on Hexcel's discharge as being effective against claims based on Hexcel's pre-petition conduct, such as post-confirmation lenders and investors, as well as to the detriment of creditors whose claims were discharged. Furthermore, such a holding would allow EPA to completely circumvent the objectives of the Bankruptcy Code by strategically choosing not to file a proof of claim, which otherwise would constitute submission to the jurisdiction of the Bankruptcy Court, and then later claiming that the agency is not susceptible to a declaratory action seeking discharge as a result of CERCLA Section 113(h).

Because the plain language of Section 113(h) does not limit the jurisdiction of this Court to review whether EPA's CERCLA claims were discharged in Hexcel's bankruptcy, the analysis should end there, and EPA's motion for judgment on the pleadings should be denied. Notwithstanding the clear and unequivocal language of Section 113(h), the policies advanced by Section 113(h) would not be hindered by this adversary proceeding because this proceeding will not cause any delay in EPA's environmental assessment and cleanup and because there is no risk of piecemeal litigation resulting from this adversary proceeding. Thus, this Court should find,

consistent with *Manville*, that this adversary proceeding is not pre-enforcement review covered by Section 113(h) of CERCLA.

### 2. Hexcel's Complaint Is Not A Challenge To A Removal Action Under Section 104.

The prior section demonstrated that EPA's argument that Hexcel did not meet the exceptions of Section 113(h) was inapposite because Hexcel's adversary proceeding is not covered by the plain prefatory language of Section 113(h) regarding challenges to removal or remedial actions selected under Section 104 of CERCLA. In Section III of its Brief, EPA attempts to circle back around and argue that Hexcel's complaint is indeed a challenge to a removal or remedial action. For the reasons already discussed, including the analysis undertaken by the *Manville* court, EPA's claims should be denied. In any event, EPA's characterizations of Hexcel's complaint are inappropriate and incorrect.

EPA argues that its notice letter seeking funding for an RI/FS is a removal action within the meaning of CERCLA. Brief at 17. EPA then equates Hexcel's adversary proceeding to determine dischargeability with a challenge to the notice letter. For example, EPA variously states: "Hexcel challenges the issuance of a notice letter asking for the funding of an RI/FS." Brief at 16; "Hexcel's challenge to EPA's response action..." Brief at 18; "Hexcel's action is an express challenge to this response action." Brief at 19. EPA has blatantly mischaracterized Hexcel's complaint and glossed over meaningful distinctions between this adversary proceeding and a challenge to the Notice Letter or to any EPA removal or remedial action. As explained above, Hexcel is not seeking a review of its liability under the Notice Letter. Nor is Hexcel challenging EPA's RI/FS process nor Hexcel's liability to contribute to the RI/FS. Rather, Hexcel is asking this court to decide whether these liabilities, to the extent they exist, were

discharged in Hexcel's prior bankruptcy. The *Manville* court properly concluded that a post-confirmation adversary proceeding does not implicate Section 113(h).

Further, EPA's reliance on *Fairchild Semiconductor* is misplaced.[5] EPA cites that case and its quotation of a portion of the legislative history of Section 113(h) (a statement by Senator Thurmond) discussing the breadth of the prohibition on pre-enforcement review to support its conclusion that "a proceeding that relates to [a] response action will be barred under Section 113(h)." EPA Brief at 18. At the outset, because the language of Section 113(h) is clear, there is no reason to review the legislative history. *See General Electric*, 360 F.3d at 191 ("We begin and end with the language of § 113(h), because when the statutory text is straightforward, there is no need to resort to legislative history.") Nevertheless, relying on the legislative history, EPA appears to argue that because Hexcel's complaint "relates to the response action," even if it does not challenge it directly, this should be enough to implicate Section 113(h). Brief at 18 (relying on Senator Thurmond's statement that Section 113(h) covers all lawsuits *concerning* EPA's response actions). Yet the D.C. Circuit in *General Electric* cast doubt over the relevance of Senator Thurmond's statement, stating: "this statement contrasts with the House, Senate and Conference Reports [citations omitted] which refer to legal challenges to the selection and implementation of particular response actions," as opposed to a more functional approach that would turn on a question of whether the challenge would interfere with a response action. *Id.* at 193-4 (citations omitted). *See also*, *Reardon*, 947 F.2d at 1516 (legislative history referring to "'review of orders or response actions' suggests that the writers of the Senate Report focused their concern on the problems that would arise if courts reviewed the *merits* of particular EPA actions.") (emphasis in original). The *General Electric* court thus found that "the senator's

[5] *Fairchild* itself had nothing to do with bankruptcy. The court found that Fairchild was contesting EPA's remedial decisions and thus was covered by the Section 113(h) jurisdictional bar. The facts here are in no way analogous.

statement is hardly persuasive evidence of congressional intent," *Id.*, and that "EPA's functional approach ignores the plain language of § 113(h), which limits the bar to any challenges to removal or remedial actions under § 104 or any orders under § 106(a)...." *Id.* at 194.

Here, EPA does not even attempt to argue that Hexcel's complaint would interfere with the response action, but rather attempts to obscure the real issue by contending that the complaint "relates to" or concerns a response action. As in *General Electric*, EPA cannot escape the plain language of Section 113(h) which does not cover adversary proceedings in bankruptcy, but only covers challenges to removal or remedial actions under Section 104 or orders under Section 106. Because Hexcel's complaint concerns only the dischargeability of liabilities in bankruptcy, and does not directly challenge any removal or remedial action such as the notice letter or the RI/FS or Hexcel's liability under the Notice Letter or RI/FS, this Court should deny EPA's motion.

## IV. CONCLUSION

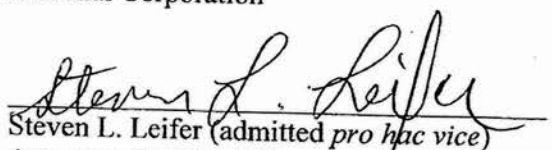
For the reasons set forth above, the Court should reject EPA's motion for judgment on the pleadings and find that Section 113(h) of CERCLA does not bar the Court's consideration of this adversary proceeding.

Respectfully submitted,

BAKER BOTTS LLP

and

GOLDBERG, STINNETT, MEYERS & DAVIS
A Professional Corporation

By: 
Steven L. Leifer (admitted *pro hac vice*)
Attorneys for Plaintiff,
Hexcel Corporation, the Reorganized Debtor